

Vol 31
IN THE

U. S. DISTRICT COURT, U. S.
FILED
SEP 11 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 418

RAYMOND R. SMITH, AS RECEIVER OF NORTHERN INDIANA
RAILWAY, INC., NORTHERN INDIANA RAILWAY,
INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
Petitioners,
against

ABBOTT LAWRENCE MILLS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

RAYMOND R. SMITH, as Receiver of
Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
Counsel for said Petitioner.

SEEBIRT, OARE & DEAHL,
Of Counsel for Raymond
R. Smith, Receiver.

NORTHERN INDIANA RAILWAY, INC.,
By AL. W. JOHANNES,
Counsel for said Petitioner.

GIRARD TRUST COMPANY, as Trustee,
By S. J. CRUMPACKER,
Counsel for said Petitioner.

PARKER, CRABILL, CRUMPACKER,
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Of Counsel for Girard
Trust Company, Trustee.



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INC., AND GIRARD TRUST COMPANY, AS TRUSTEE,
Petitioners,
against

ABBOTT LAWRENCE MILLS,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable Charles Evans Hughes, Chief Justice,
and the Associate Justices of the Supreme Court of the
United States:*

Petitioners, Raymond R. Smith as Receiver of Northern Indiana Railway, Inc., Northern Indiana Railway, Inc., and Girard Trust Company, Trustee, respectfully pray that a writ of certiorari issue to review the judgment entered January 22, 1940 in the United States Circuit Court of Appeals for the Seventh Circuit (R. 144-152) in the above entitled cause affirming the judgment of the District Court of the United States for the Northern District of Indiana dismissing plaintiff's suit for lack of jurisdiction, and the

supplemental judgment entered June 28, 1940 reversing the judgment of said District Court and mandating said District Court to grant plaintiff the relief prayed for (R. 154-156).

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

The Chicago, South Bend & Northern Indiana Railway Company, an Indiana corporation operating a street railway system in South Bend, Indiana, was adjudged insolvent in 1927 in a creditor's suit in the United States District Court and a Receiver was appointed for it; trustees for three mortgages intervened and filed complaints to foreclose their mortgages; the petitioner, Girard Trust Company, trustee under a first mortgage prior in date and lien to said three mortgages, was not a party (R. 125). The Receiver operated the railway under the orders of said Court. On February 19, 1928 plaintiff Abbott Lawrence Mills suffered an injury in a collision with one of the street cars operated by said Receiver and on July 1, 1928 brought suit in a state court of Indiana to recover damages for said injury (R. 106). On November 9, 1929 said District Court entered a decree foreclosing said three mortgages and ordering sale of all the property of said Company subject to the mortgage of the Girard Trust Company, Trustee (R. 103-106).

Said decree gave said three mortgagees judgments for sums totalling \$3,970,244.56, ordered all the property of said company sold, and that all rights, titles and interests of all the parties, and their respective creditors shall forever be barred (R. 102).

Said decree set out 23 judgments for injuries to persons

and property and adjudged that they were allowed as junior, inferior and subsequent to the liens of said three mortgages (R. 103 (d)). Plaintiff did not in any way intervene in said receivership proceedings and no specific reference was made to his claim (R. 125). Said decree also allowed claims of creditors in the sum of \$146,976.70 as preferred claims to be paid out of net income from operation during six months prior to the appointment of the Receiver (R. 103).

The decree further provided:

(1) All liability for negligence claims not now reduced to judgment against said Company or its receiver, "shall be valid as against the property of said railway company, at the sale ordered made to the same extent as though any judgment thereon had been recovered prior to the sale (R. 103(f)).

(2) For the purpose of enforcing the provisions of this decree jurisdiction of this cause is retained by this court, and the court reserved the right to retake and resell the property in case such purchaser or his successors and assigns shall fail to comply with any order of the court in respect to the payment of such principal indebtedness or liabilities within thirty days after service of a copy of such order, or if an appeal be taken from any such order within a period of twenty days after the service of notice of the entry of the order finally affirming such order on appeal (R. 103(g)).

(3) Notice having been heretofore given pursuant to orders of this court requiring all creditors to file claims and demands, and the time for such filing heretofore fixed having expired, all claims and demands which have not already been filed pursuant to the orders hereinabove made as aforesaid other than (1) all claims for deficiencies of the trustees under the mortgages foreclosed or enforced by

this decree in respect of the bonds issued under such mortgages, (2) any claims which may accrue after the entry of this decree and/or which may thereafter be proved *nunc pro tunc* by permission of this court, and (3) any claims in respect of the mortgages subject to which the property herein directed to be sold is sold, or in respect of any bond or obligation issued under said mortgages, shall be finally barred and foreclosed, and no such claim so barred or foreclosed shall be enforced against the receiver or against assets in the hands of the receiver or against the property sold or any portion thereof or against the purchaser thereof or any part thereof, nor shall the holder of any such claim or demand be entitled to the benefits of any right whatsoever under this decree, nor shall any such claim or demand be entitled to the benefits of any right whatsoever under this decree, nor shall any such claim or demand be entitled to share in the distribution of any of the proceeds of sale of the property directed by this decree to be sold or of any other funds or property distributable in the above entitled causes or any of them (R. 104(h)).

(4) Any such purchaser or purchasers, or their successors or assigns, shall have the right to enter his or their appearance in this court and contest any claim, demand or allowance existing at the time of the sale, and then undetermined, or any claim or demand which thereafter may arise or be presented, which shall be payable by such purchaser or purchasers, or his or their successors or assigns, or which would be chargeable against the property purchased in addition to the amount bid at the sale, and any claimant or purchaser may appeal from any decision relating to such claim, demand or allowance (R. 104(i)).

(5) All questions not herein disposed of are hereby reserved for future adjudication, including all questions as to the amount of income received within six months prior to the appointment of such receiver and during the re-

ceivership period, and now impounded and subject to said respective mortgages or not so impounded, and the court retains jurisdiction of this cause and of the property affected in this decree for the purpose of finally disposing in term time or vacation, of all such questions and matters; and any party to this cause as well as any purchaser, his successor or assigns may apply at the foot of this decree to this court for further order and directions (R. 105(l)).

The order of court of February 11, 1930 confirming the sale provided, among other things:

- (1) That the sale was made in conformity to the order (R. 107).
- (2) The receiver's report of sale is in all things confirmed as final and absolute, subject, however, to all the terms and conditions of the decree and to all the rights and authorities reserved to said purchasers and to their assigns and to this court in and by the decree and by this order (R. 108(b)).
- (3) This court expressly retains a paramount lien and charge upon, and jurisdiction of, the property sold at said sale as against all provisions of the decree and of this order, and the power to retake said property, or any part thereof, sold under the decree and apply it to the satisfaction of any unpaid balance of the purchase price in case the company shall fail to pay the same (a) in accordance with the provisions of this order, or (b) in accordance with the provisions of any other order of the court directing such payment within thirty days after the service of a copy of such other order, or if an appeal be taken from this order or from any such other order, within twenty days after service of notice of the entry of the order finally affirming any such order on appeal (R. 108).

- (4) Upon the production of the deed the grantee shall be let into possession of the property conveyed, and the

receiver shall deliver possession to the grantee, and after delivery of possession, the grantee shall hold, possess and enjoy the property so conveyed free from any charge or claim in respect of the receiver's indebtedness, and free from the trust and lien of said three mortgages so foreclosed, and free from all liens, claims, rights, interests or equity of redemption of, in and to the same by or of Chicago, South Bend & Northern Indiana Railway Company, or by or of all persons claiming by, under or through said last named company, its creditors or its stockholders, and by or of all parties to the above entitled causes, or any of them, subject to compliance by the grantee with all the terms and conditions imposed by the decree, this order and said deed. Upon delivery of the deed said Northern Indiana Railway, Inc. shall be entitled to receive all cash, accounts receivable and supplies in the hands of the receiver at the time of sale to the extent provided by the decree (R. 108(j)).

(5) All questions not by the decree or hereby disposed of are hereby reserved for future adjudication (R. 109).

Before October 30, 1930 said Receiver filed in said receivership proceedings his final report and asked for his discharge. Said report showed that he had divested himself of all property of said railway corporation (R. 110). On October 30, 1930 said report was approved by the Court and said receiver was unconditionally discharged (R. 111).

On October 30, 1930 trial was begun in the action brought by plaintiff Mills; verdict for \$12,500.00 was returned on November 5, 1930, and judgment was rendered upon said verdict on December 22, 1930; the receiver appealed from said judgment without bond, and there was no stay on said execution; the Appellate Court of Indiana affirmed said judgment April 26, 1933 and the

Supreme Court denied a transfer of said cause on April 26, 1934 (R. 125).

The property so purchased by the petitioner Northern Indiana Railway, Inc., was operated by it until December 28, 1931 when in a creditor's suit a receiver was appointed for it by the St. Joseph Circuit Court, and since that time the property has been operated by said receiver and said St. Joseph Circuit Court through its said receiver has had possession of all of said property (R. 111-115). Raymond R. Smith was appointed Receiver by said court; he is the same person who was appointed Receiver of Chicago, South Bend & Northern Indiana Railway Company by the United States District Court in 1927 (R. 126).

On June 22, 1933 the Receiver of Northern Indiana Railway, Inc., filed his petition in the St. Joseph Circuit Court to fix a time for the filing of claims against said corporation; and on said day said court by its order fixed September 15, 1933 as the time before which any and all persons holding or claiming to hold any claim or lien against the corporation's property should file their written claim with the Receiver. Notices were published of the requirements of said order. It was further ordered that claims or liens not so filed were barred (R. 113-5). That the plaintiff never filed any claim with the Receiver, but on September 12, 1933 he did file in said court in the suit of said receivership his petition to preserve what is denominated as a Federal lien based upon his alleged judgment obtained in the State Court (R. 115-8).

Also on March 7, 1935 said plaintiff filed in said receivership proceedings in the St. Joseph Circuit Court his objection to a distribution of the proceeds of sale of abandoned property to the mortgagees (R. 118-21). That

neither said petition or objection has ever been submitted to the St. Joseph Circuit Court (R. 120).

The plaintiff filed this action in the District Court on February 14, 1936 (R. 127).

II.

Reasons Relied On for the Allowance of the Writ.

A.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver and after his discharge is not void, is in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit on the same matter, in the case of *Shepherd v. St. Louis Public Service Company*, 64 Fed. (2nd) 612.

B.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver and after his discharge is not void, is in conflict with the applicable decisions of this Court.

C.

The decision of said Circuit Court of Appeals upon the question that a judgment rendered only against a Receiver after his discharge and after all the trust property in his hands has been distributed under the order of the court is void, is a decision of an important question of local law, and in a way that is in conflict with local decisions.

D.

The decision of the Circuit Court of Appeals that the decree of the District Court foreclosing the mortgages and ordering a sale of the property of Chicago, South Bend & Northern Indiana Railway Company, and the judgment for plaintiff against said Company's Receiver, cast a lien upon the property in the possession of the purchaser, Northern Indiana Railway, Inc., at the sale held before the rendition of said judgment, and without the purchaser being made a party to any of said proceedings, is a decision of an important question of local law in a way that is in conflict with applicable local decisions.

E.

The decision of the Circuit Court of Appeals that notwithstanding the facts that the receiver of Chicago, South Bend & Northern Indiana Railway Company was unconditionally discharged on October 30, 1930, and that a receiver for the purchaser, Northern Indiana Railway, Inc., was appointed on December 28, 1931 by the St. Joseph Circuit Court, a state court, in which its property and affairs were being administered in an equity receivership from that time until and after February 14, 1936 when plaintiff brought the instant suit, nevertheless that a United States Court could again retake possession and by its decree fasten a lien upon said property, and thus interfere with the jurisdiction of said St. Joseph Circuit Court in the administration of said receivership, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Field v. Kansas City Bonding Co.*, 9 Fed. (2nd) 213, and is in conflict with decisions of this Court in the case of *Lion Bonding Co. v. Karatz*, 262 U. S. 77 and other cases therein cited.

F.

The decision of the Circuit Court of Appeals erroneously holds that plaintiff has a lien upon the property sold at the receiver's sale. The judgment of the State Court could not deal with the property or impress any lien thereon; it merely determined the existence and amount of the claim. The foreclosure judgment of the District Court did not create any lien; it provided that "all liability for negligence claims not now reduced to judgment shall be valid as against the property of said railway company at the sale herein ordered made *to the same extent as though any sale thereon had been recovered prior to the sale.*" If the judgment against the receiver had been recovered prior to the sale, obviously it would not have given the plaintiff a lien upon the property, it would have merely determined the amount of the claim. The foreclosure decree required every such judgment whether procured before or after the sale to be brought to the District Court by way of intervention in the receivership proceedings. Said decision is in conflict with the decision of this Court in *Riehle v. Margolies*, 279 U. S. 218.

G.

The decision of the Circuit Court of Appeals that the plaintiff's "judgment is a valid adjudication against the parties defendant in this proceedings" is a determination as to the petitioner, Girard Trust Company, Trustee, that plaintiff secured a lien superior to its mortgage in a legal proceedings to which said Girard Trust Company, Trustee, was not a party, and in which it did not appear or intervene; that said decision is a taking of said petitioner's property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

III.

Your petitioners present to the Court and file herewith as an exhibit hereto a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings in said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate.

RAYMOND R. SMITH, as Receiver of
Northern Indiana Railway, Inc.,
By ORLO R. DEAHL,
Counsel for said Petitioner.

SEEBIRT, OARE & DEAHL,
Of Counsel for Raymond
R. Smith, Receiver.

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